by the cesser. In the case before me I am not concerned with a deemed passing of a fictitious slice of property under section 7(b) of the Estate Duty Ordinance but an actual passing of property under section 6. I, therefore, think that *Re Palmer* is not in point.

I come now to Mr. Smith's contention that effect must be given to the testator's intention. By his will the testator directs the trustees to sell his freehold and leasehold property at the date of distribution and to divide the proceeds of sale amongst the several persons then entitled to receive the income in proportions specified by Mohamedan law. Mr. Smith contended that, as there was no provision for payment of estate duty in 1875, the testator could not have contemplated that estate duty would be payable upon the deaths of income beneficiaries; and that, therefore, such estate duty must be paid out of the corpus of the testator's estate and the balance of the corpus divided as directed by the testator. As I have already stated, where property actually passes on the death of any person, estate duty is a tax upon the property which passes and diminishes that property and no other property. It is true that the normal incidence of estate duty may be altered by the direction of the testator. But in the present case it is clear that the testator has not altered the incidence of estate duty, as he could not and did not foresee that estate duty would have to be paid on the deaths of income beneficiaries. In my opinion, it was the testator's intention that the proportions in which the income beneficiaries were to take the corpus of his estate at the date of distribution should be the proportions in which they shared the income. Effect is given to this intention by not interfering with the incidence of estate duty payable upon the deaths of income beneficiaries.

It was for the above reasons that I decided that the estate duty paid under the Estate Duty Ordinance on the death of each of the income beneficiaries who died before the 28th May, 1961, should be borne by that portion of the corpus of the testator's estate which passed upon the deaths of the respective income beneficiaries.

Another question I had to decide was whether the interest charged after the 28th May 1961 in respect of unpaid estate duty, or interest charged after that date on mortgages made for the purpose of paying estate duty on the deaths prior to that date of income beneficiaries, should be borne by the corpus of the testator's estate or that portion of the corpus which passed or is deemed to have passed upon the deaths of the respective income beneficiaries. In view of my decision as to the incidence of estate duty paid on the death of each of the income beneficiaries who died before the 28th May 1961, I decided that such interest should be borne by that portion of the corpus which passed upon the deaths of the respective income beneficiaries.

Order accordingly.

Solicitors: *Donaldson & Burkinshaw; Braddell Bros.; Laycock & Ong.*

PUBLIC PROSECUTOR v. LIM TEIK HENG

[A. Cr. J. (Hepworth J.) August 3, 1962]

[Penang — Case Stated No. 1 of 1962]

Merchant Shipping — Alteration of "load line mark" — Merchant Shipping Ordinance, 1952, s.313(b) — Whether excludes mens rea.

Criminal Law and Procedure — Mens rea — Whether s.313(b), Merchant Shipping Ordinance, 1952, excludes by implication — Case stated under s.317, Criminal Procedure Code (Cap. 21).

The accused was convicted in the Magistrate's Court at Penang as the registered owner of a boat of altering the load line mark on the said boat, an offence punishable under section 313(b) of the Merchant Shipping Ordinance, 1952 and was sentenced to a fine of $450. The learned Magistrate, however, considered that an important point of law affecting the public interest required decision and remitted the matter to the High Court under the provision of section 317 of the Criminal Procedure Code. The question for the opinion of the High Court was whether the legislature has by virtue of the wording of section 313(b) of the said Ordinance necessary implication excluded *mens rea.*

Held: (1) the legislature has not by the wording of section 313(b) of the Ordinance excluded *mens rea* by necessary implication;

(2) in this case it was not proved at the hearing where, when and by whom the load line of the boat had been so altered and there was no finding of fact by the learned Magistrate on these points. As no *actus reus* had been proved the question of exclusion of *mens rea* by necessary implication did not arise;

(3) where a case is stated under section 317 of the Criminal Procedure Code the case should set out the facts found by the Magistrate upon the evidence and not the evidence itself. The Court accepts these facts as conclusive and if the only issue is one of fact the Court will not entertain the case stated. Questions of law alone are considered;

(4) the conviction and sentence must therefore be quashed.

Cases referred to:—

(1) *Public Prosecutor* v. *Sundram* [1955] M.L.J. 159.

(2) *R.* v. *Yeomans* (1860), 24 J.P. 149.

CASE STATED.

Wan Suleiman bin Pawan Teh (Deputy Public Prosecutor) for the Public Prosecutor.

Eusoffe Abdoolcader for the accused.

Cur. Adv. Vult.

Hepworth J.: In Magistrate's Court Case No. 769 of 1962 in the Magistrate's Court at George Town, Penang, the accused was convicted as the registered owner of mv. "Lam Liany 24" of altering the load line mark on the said ship, an offence under section 313(b) of the Merchant Shipping Ordinance, 1952, and was sentenced to a fine of $450. The learned Magistrate, however, considering that an important point of law affecting the public interest requires decision, has remitted the matter to the High Court under the provisions of section 317 of the Criminal Procedure Code. The question for the opinion of the High Court is whether the Legislature has by virtue of the wording of paragraph (b) of section 313 of the said Ordinance by necessary implication excluded *mens rea.* In other words that knowledge on the part of the registered owner is not an essential ingredient of the offence.

At the hearing the learned Magistrate found as a fact that some time on or before the 26th

January, 1962, the load line of the boat was altered to an extent of approximately 8½ inches by raising the deck and lifting the deck line and load line upwards proportionately. It was not, however, proved at the hearing where, when and by whom the load line of the boat had been so altered, and there was no finding of fact by the learned Magistrate on these points.

Section 313 of the Ordinance reads as follows :—

"If—

(a) the owner or master of a British or Malayan load line ship registered in the Federation which has been marked in accordance with the foregoing provisions of this Part, fails without reasonable cause to keep the ship so marked; or

(b) any person conceals, removes, alters, defaces or obliterates, or suffers any person under his control to conceal, remove, alter, deface or obliterate, any mark placed on any such ship in accordance with the foregoing provisions of this Part, except with the authority of a person entitled under the load line rules to authorise the alteration of the mark or except for the purpose of escaping capture by an enemy;

he shall for each offence be liable to a fine not exceeding one thousand dollars."

It is quite clear from the wording of paragraph (b) of section 313 that the first thing that has to be proved by the prosecution when someone is accused of an offence under this sub-section is that the accused person concealed, removed, altered, defaced or obliterated any mark or suffered anyone to do any of those things. The *actus reus* must be proved. It is essential for the prosecution to prove who "any person" is in the particular case. Of course once it has been proved that an accused person did conceal, remove, alter, deface or obliterate any mark or did suffer someone to do any of those things then, *ipso facto, mens rea* will have been proved. In this case on the facts as found by the learned Magistrate no *actus reus* has been proved. There is no one who may, so to speak, have a guilty mind. The question of the exclusion of *mens rea* by necessary implication therefore does not arise.

I think that the learned Magistrate has confused himself by misreading the judgment of Buhagiar J. in *Public Prosecutor* v. *Sundram*.[1] In that case, where it was the owner of the vehicle who was charged, the learned Judge held that the prohibition on the user of a motor vehicle imposed under section 7 of the Motor Vehicles Commercial Use (M.P.) Regulations is absolute in the sense that no *mens rea* need be proved in addition to the user to constitute an offence. Knowledge on the part of the owner of the vehicle is not an essential ingredient of the offence.

Paragraph (a) of section 313 of the Ordinance provides an interesting comparison with paragraph (b). To establish an offence under that sub-section it is only necessary for the prosecution to prove that the accused person is the owner or master of the ship and that there has been a failure to keep such ship marked in accordance with the foregoing provisions of Part VI of the Ordinance. Under this paragraph knowledge on the part of the registered owner is not an essential ingredient of the offence. A conviction will not of course be recorded if the owner or master, as the case may be, shows that there was reasonable cause for such failure, but lack of knowledge by itself will not be sufficient. It will have to be shown that it was reasonable that he did not know.

I think there is little doubt that the charge in this case should have been framed under paragraph (a) of section 313 of the Ordinance.

The problem that now arises is what order should be made on this case stated. It is submitted by the learned Deputy that this case can be dealt with on revision under section 322 of the Criminal Procedure Code and that a conviction under paragraph (a) of section 313 of the Ordinance should be substituted.

I think however that there are two good reasons for not invoking the provisions of section 322 of the Criminal Procedure Code. The first is that there is no doubt that the prosecution, before the hearing in the Magistrate's Court commenced, had in mind the desirability of framing a charge under paragraph (a) and amending the charge from an offence under paragraph (b) of section 313 to an offence under paragraph (a). A charge under paragraph (a) was in fact framed and a copy was sent by the prosecution to defence counsel informing him that at the date of trial the charge was to be amended. However the fact remains that the prosecution for some reason which is not on record proceeded upon the charge for an offence under paragraph (b).

The second consideration, however, is, I think, of much greater weight. Where a case is stated under section 317 of the Criminal Procedure Code the case should set out the facts found by the Magistrate upon the evidence and not the evidence itself. The Court accepts these facts as conclusive and if the only issue is one of fact the Court will not entertain the case stated. (*R. v. Yeomans*).[2] Questions of law alone are considered. (*Mallal's* Criminal Procedure, 4th Edition, page 476). If I was to proceed on revision under section 322 of the Criminal Procedure Code questions of fact could be considered and also questions of law other than those in respect of which the case was stated. In other words the Court would be doing things which are prohibited under sections 317 and 318 of the Criminal Procedure Code. To do so would be to circumvent sections 317 and 318.

I am accordingly of the view that it would be wrong on this case stated to invoke the provisions of section 322 of the Criminal Procedure Code.

In my opinion therefore for the reasons stated the Legislature has not by the wording of paragraph (b) of section 313 of the Ordinance excluded *mens rea* by necessary implication. I conceive it to be my duty in circumstances such as are present in this matter either to quash or confirm the order of the Magistrate's Court. I think the Magistrate's Court is *functus officio* with regard to it. As the prosecution have failed, on the facts as found by the learned Magistrate, to prove the *actus reus* necessary for a conviction of the accused under paragraph (b) of section 313 of the Ordinance I order that the conviction and sentence be quashed and that the accused be acquitted. Fine to be refunded.

Conviction and sentence quashed. Accused acquitted.

Solicitors: *Presgrave & Matthews.*

ALAGAPPA CHETTIAR v. COLISEUM CAFE (No. 2)

[A. C. J. (Ong J.) August 6, 1962]

[K.L. — F.M. Civil Appeal No. 11 of 1961]

Practice and Procedure — Costs — Appeal or on cross-appeal from decision of lower court — R.S.C., O.65 r.27, regulation (59).

This was an application by the respondent in the Court of Appeal for review of the taxation of his bill of costs by the Assistant Registrar and for the bill to be remitted back for taxation with appropriate directions. The question raised was whether regulation (59) of Order 65, rule 27 of the Rules of the Supreme Court, 1957, which fixes profit costs at 30 per cent. of the value of the subject matter, applies not only to appeals to the High Court from decisions of Subordinate Courts, but also, by extension or analogy, to bills of costs carried in for taxation upon appeals from the High Court to the Court of Appeal in cases where the proceedings originated in the Subordinate Courts. The learned Assistant Registrar was of the opinion that it did and he accordingly taxed the respondents bill of costs under the first proviso to regulation (59) and allowed the profit costs at 30% of 12 months' rent of the premises in question added to the claim for mesne profits.

Held: regulation (59) of R.S.C., O.65 r.27 is limited expressly to taxation in appeals "from a decision of a lower court" and the last proviso, which refers to "the judge hearing the appeal", leaves no further room for doubt, since appeals to the Court of Appeal are not heard by a single judge.

Application allowed with costs to be taxed. Respondent's bill remitted to the Assistant Registrar for taxation according to scale.

Observations on the reasons given by the Assistant Registrar for taking the view he did.

Cases referred to:—

(1) *Sparrow* v. *Hill* (1881) 7 Q.B.D. 362, 367.

(2) *Craske* v. *Wade* (1889) 80 L.T. 380.

(3) *Re Johnson* [1904] 1 Ch. 132.

APPLICATION FOR REVIEW OF TAXATION.

S. D. K. Peddie for the appellant.

R. Ramani for the respondent.

Ong J.: This is an application by the successful respondent in the Court of Appeal for review of the taxation of his bill of costs by the Assistant Registrar and for the bill to be remitted back for taxation with appropriate directions. The question raised is whether regulation (59) of Order 65, rule 27 of the Rules of the Supreme Court, 1957, which fixes profit costs at 30 per cent of the value of the subject matter, applies not only to appeals to the High Court from decisions of subordinate courts, but also, by extension or analogy, to bills of costs carried in for taxation upon appeals from the High Court to the Court of Appeal in cases where the proceedings originated in the subordinate courts. The learned Assistant Registrar was of the opinion that it did and he accordingly taxed the respondents bill of costs under the first proviso to regulation (59) and allowed the profit costs at 30 per cent of twelve months' rent of the premises in question added to the claim for mesne profits. With respect, I am afraid that I am unable to agree.

Regulation (59) reads as follows:

" (59). Where costs are awarded by the Supreme Court in an appeal or on a cross-appeal from a decision of a lower Court, the profit costs shall ordinarily be a sum equal to thirty per centum of the value of the subject matter of the appeal or cross-appeal.

Provided that in any appeal relating to the recovery of immovable property the value of the subject matter of the appeal shall be deemed to be twelve months' rent of the premises or the annual value added to the amount of any money claim for rent or mesne profits or damages.

Provided further that in any appeal relating to maintenance orders in respect of married women and children the subject matter shall be deemed to be an amount equivalent to twelve times the amount of the monthly order for maintenance or where no order has been made, such amount as the Court may assess, subject in all cases to a maximum of $1,000 in the case of Magistrates' Courts and $2,000 in the case of Sessions Courts.

Provided however that in cases of special importance or difficulty the Judge hearing the appeal shall have power if so requested when awarding such costs to direct that the same be taxed in accordance with the Scale of Costs applicable to proceedings in the Supreme Court and to give any such directions concerning the maximum amount to be allowed on such taxation as in the circumstances may be just."

In my opinion this regulation is limited expressly to taxation in appeals "from a decision of a lower court", and the last proviso, which refers to "the Judge hearing the appeal", leaves no further room for doubt, since appeals to the Court of Appeal are not heard by a single Judge.

I think I ought to make some observations on the reasons given by the Assistant Registrar for taking the view he did, since he had obviously taken great pains over the matter. First, it is true that there is the reference to "the Supreme Court" in the Regulation, but in the context, it can only mean the High Court as part of the Supreme Court. Appeals from the lower courts can never go direct to the Court of Appeal. An appeal to the High Court and a second appeal to the Court of Appeal are two distinct appeals,